



City of NORFOLK

C: Dir., Department of General Services

To the Honorable Council
City of Norfolk, Virginia

May 19, 2015

From: David S. Freeman, AICP
Director of General Services

Subject: Encroachment Agreement
for Outdoor Dining – Cleo Ruby, Inc.
Boush Street at 150 West Main Street

Reviewed: Sabrina Joy-Hogg
Sabrina Joy-Hogg, Deputy City Manager

Ward/Superward: 2/6

Approved: Marcus D. Jones
Marcus D. Jones, City Manager

Item Number:

R-1

I. **Recommendation:** Adopt Ordinance

II. **Applicant:**

Cleo Ruby, Inc.
Attn: G. Todd Jurich, President
150 Main Street, Suite 100
Norfolk, Virginia 23510

Building Owner:
City of Norfolk
810 Union Street
Norfolk, Virginia 23510

III. **Description:**

This agenda item is an Encroachment Agreement to permit restaurant operator Cleo Ruby, Inc. to encroach approximately 345.83 square feet into City of Norfolk right-of-way. The purpose of this encroachment is to allow outdoor dining to encroach into the right-of-way located at Boush Street at 150 West Main Street. Part of the Lease, dated November 1, 2013, Cleo Ruby, Inc. exercised its option to extend the term of the Lease for an additional five years, until February 29, 2020, but the Amendment to Lease did not include the extension of the Encroachment Agreement, which by its terms expired on February 28, 2015.

IV. Analysis

An encroachment is an object or structure that infringes into the City of Norfolk's right-of-way or property. Norfolk City Code, Section 42-10, requires all encroachments into City rights-of-way and properties to be approved by City Council.

This Encroachment Agreement will permit Cleo Ruby, Inc. to encroach approximately 345.83 square feet into City of Norfolk right-of-way. The term of the encroachment is no longer than five (5) years, commencing on March 1, 2015 and terminating February 29, 2020.

Hours of Operation	Outdoor Seating Capacity
Mon – Fri 11:30 AM – 10:00 PM Sat – 5:30 PM - 10:00 PM Sunday - Closed	16

V. Financial Impact

This encroachment is part of the Renewed Indenture of Lease that is in effect until February 29, 2020, referenced in paragraph 5, page 3 of the Renewed Indenture of Lease dated March 1, 2010. Payments for the encroachment are included in the lease payments.

VI. Environmental

There are no known environmental issues associated with this property.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action

The outdoor dining request was approved by the Design Review Committee and Planning Commission in 2006.

IX. Coordination/Outreach

This letter has been coordinated with the Department of General Services - Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement

Form and Correctness Approved:

By Nathan S. Seaman
Office of the City Attorney

Contents Approved:

By [Signature]
DEPT. General Services

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE GRANTING CLEO RUBY, INC. PERMISSION TO ENCROACH INTO THE RIGHT OF WAY OF BOUSH STREET AT 150 WEST MAIN STREET APPROXIMATELY 345.83 SQUARE FEET FOR THE PURPOSE OF OUTDOOR DINING, AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

- - -

WHEREAS, the Economic Development Authority of the City of Norfolk ("EDA") and Cleo Ruby, Inc. ("Bistro") entered into an Indenture of Lease, dated October 5, 2001 ("Lease") for premises located on the first floor of the office building currently known as SunTrust Building and located at 150 W. Main Street in the City of Norfolk ("Building"), which Lease provided that Bistro had the right to extend the Lease for three successive periods of five years each upon certain terms and conditions; and

WHEREAS, by Deed of Bargain and Sale, dated December 5, 2001, the EDA conveyed the Building to the City of Norfolk ("City") and assigned the Lease to the City; and

WHEREAS, By Renewed Indenture of Lease, dated as of March 1, 2010, Bistro exercised its option to extend the term of the Lease for an additional five years, commencing on March 1, 2010 and ending on February 28, 2015, which Renewed Indenture of Lease

adjusted the lease payment schedule and included the right to encroach into the right of way of Boush Street for a term of five years, until February 28, 2015, for purposes of outdoor dining in accordance with the terms and conditions of the Encroachment Agreement, with the payments for the encroachment to be included in the lease payments; and

WHEREAS, by Amendment to Lease, dated November 1, 2013, Bistro exercised its option to extend the term of the Lease for an additional five years, until February 29, 2020, but the Amendment to Lease did not include the extension of the Encroachment Agreement, which by its terms expired on February 28, 2015; and

WHEREAS, it was the intention of the parties that Bistro's right to encroach into Boush Street for purposes of outdoor dining be extended as part of the Lease; now, therefore,

BE IT ORDAINED by the Council of the City of Norfolk:

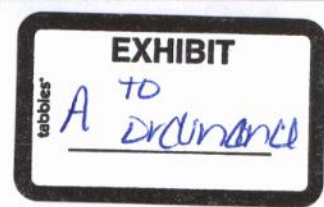
Section 1:- That the terms and conditions of the Encroachment Agreement between the City and Bistro, a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to Bistro to encroach into the right of way of Boush Street at 150 W. Main Street approximately 345.83 square feet for the purpose of outdoor dining and for no other purpose.

Section 2:- That the City Manager and other proper officers of the City are hereby authorized to execute the Encroachment Agreement and do all things necessary for its implementation.

Section 3:- That the City Manager is further authorized to correct, amend or revise the Encroachment Agreement as he may deem advisable consistent with the

intent of the Council as expressed therein.

Section 4:- That this ordinance shall be in effect from and after its adoption.



ENCROACHMENT AGREEMENT

This **ENCROACHMENT AGREEMENT** (hereinafter "Agreement") is made and entered into this ____ day of _____, 2015, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia (hereinafter, "City"), and **CLEO RUBY, INC.**, a Virginia corporation (hereinafter, "Bistro").

WITNESSETH:

1. **ENCROACHMENT AREA:** City hereby grants permission to Bistro to encroach into the right of way at Boush Street at 150 West Main Street an area measuring a total of 345.83 square feet, which encroachment shall include an awning that shall extend into the said right of way a maximum of 12 feet, all as shown on Exhibit A attached hereto, for the purpose of outdoor dining and no other purpose.
2. **USE:** Bistro shall be permitted to occupy the Encroachment Area for outdoor dining purposes in conjunction with the operation of the Bistro Restaurant.
3. **TERM; TERMINATION:** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on March 1, 2015, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on February 28, 2020. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Bistro, or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.
4. **UTILITIES:** City shall not be responsible for utilities of any type used within the Encroachment Area. Bistro shall pay all utility meter and utility services charges for all utilities,

including but not limited to, gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

5. **REPAIRS:** Bistro shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Bistro shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and competent manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

6. **REQUIREMENTS OF PUBLIC LAWS:** Bistro shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state, and municipal laws, ordinances and regulations applicable to the structure, use, and occupancy of the Encroachment Area. In addition, Bistro shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

7. **RIGHT TO ENTER AND CURE:** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs, which City deems necessary because of any failure of Bistro to meet its obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area for cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Bistro's default in making repairs.

8. **NOTICE:** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Department of General Services
Attn: Ms. Elizabeth Leathers
232 E Main St, Suite 250
Norfolk, Virginia 23510

Bistro: Cleo Ruby, Inc.
Attn: G. Todd Jurich, President
150 Main Street, Suite 100
Norfolk, Virginia 23510

With copies to: City Attorney
900 City Hall Building
810 Union Street
Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

9. **ENVIRONMENTAL MATTERS:** Bistro agrees that it will not introduce onto the Encroachment Area any toxic, hazardous, or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Bistro will not allow any air, water, or noise pollution to occur in the Encroachment Area. Bistro hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Bistro shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to occupancy by Bistro thereof.

10. **DESTRUCTION:** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

11. **NON-LIABILITY OF CITY:** City shall not be liable for any damage or injury which may be sustained by Bistro or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, heating or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Bistro, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

12. **REMOVAL OF SNOW:** Bistro agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

13. **ALTERATIONS:** Bistro covenants and agrees that it will not make any improvements, changes installations, renovations, additions, or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee and Norfolk's Planning Commission. If Bistro installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Bistro hereby agrees to remove, if requested by City, any improvements, additions, installations, and renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event Bistro fails to remove the improvements, additions, installations, renovations, and changes on or to the Encroachment

Area when requested to do so by City, then the City may remove the improvements, additions, installations, renovations, changes and Bistro shall pay for the cost of such removal.

14. **ASSIGNMENT AND SUBLETTING:** City and Bistro agree that the permission to encroach granted hereby may not be assigned by Bistro without written approval from Norfolk's City Manager. In the event its ownership or the nature of its business changes, Bistro shall notify the City within seven (7) business days.

15. **SURRENDER BY BISTRO:** Bistro will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Bistro shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Bistro's use of the Encroachment Area. If Bistro has been requested to remove and fails to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Bistro shall be liable to City for the cost of any removal and disposal.

16. **INSURANCE:** Bistro shall maintain in full force and effect Commercial General Liability ("CGL") insurance with a combined single limit policy of bodily injury, death and property damage insurance for Bistro of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) aggregate insuring against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury, and liability assumed under insured contract. The City its officers, employees, agents and representatives shall be named as additional named insured on such policy. Coverage shall be evidenced by a Certificate of Insurance provided to the City within thirty (30) days after

adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the Bistro if the insurance is cancelled or modified. Bistro shall inform the City Attorney and the Department of Development within 15 days of receiving such notice or cancellation, and immediately obtain coverage compliant with this agreement.

Bistro shall maintain the applicable statutory Workers' Compensation Insurance, and Employer's Liability Insurance with a limit of at least \$500,000 per accident/disease, and policy limit of \$500,000 covering any of Bistro' employees whose work for Bistro occurs within the premises which are subject to this agreement.

17. **INDEMNIFICATION:** Bistro shall indemnify and save harmless City from all fines, penalties, costs, suits, proceedings, liabilities, damages, claims and actions of any kind arising out of the use and occupation of the Premises by reason of any breach or nonperformance of any covenant or condition of this Lease by Bistro, or by Bistro's intentional act or negligence, and not caused in whole or in part by City. This indemnification shall extend to all claims of any person or party for death or injury to persons and damage to any property, and to legal expenses, including reasonable attorney's fees, incurred by City in the defense of such claims or incurred by City as a result of a breach of any provision of this Lease by Bistro, but does not extend to circumstances caused in whole or in part by City. Bistro shall not be responsible for damage to the building resulting from acts of nature or for structural damage, which it is not the fault of Bistro with the exception of replacement of the glass storefront.

18. **FIXTURES:** City covenants and agrees that no part of the improvements constructed, erected or placed by Bistro in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Bistro

to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Bistro in the Encroachment Area shall be and remain the property of Bistro, unless such improvements are not removed upon termination of this Agreement.

19. **ENVIRONMENTAL:**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et seq.) (IIRCRAII), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLAII) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing, or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPAII) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of the Bistro, including but not limited to the Bistro's interest in the Leased Premises or any of Bistro's property

located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Bistro may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Bistro shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Bistro shall not cause or permit, because of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Bistro shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Bistro shall comply with all applicable federal, state, and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with all permits required thereunder, any successor, or new environmental laws. Upon the receipt of any Notice, Bistro shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 20 shall apply to any successor in interest to Bistro, whether due to merger, sale of assets or other business combination or change of control.

(e) Bistro hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages

and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Bistro failure to comply strictly with the provisions of this Section 20. The provisions of this Section 20 shall survive the termination of this permission granted by this Agreement.

20. **LIENS OR ENCUMBRANCES :** If because of any act or omission of Bistro, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Bistro shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Bistro of the filing thereof, and Bistro shall have the right to contest the validity of such lien if it so chooses.

21. **APPLICABLE LAW:** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

22. **WAIVER OF TRIAL BY JURY:** To the extent permitted by law, City and Bistro mutually waive their rights to trial by jury in any action, proceeding, or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Bistro by this agreement.

23. **OTHER REQUIREMENTS:**

(a) Bistro shall comply with the City of Norfolk's Downtown Outdoor Dining Policy.

(b) Bistro shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(d) Bistro's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(e) A trashcan compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee.

24. **TITLES AND HEADINGS:** Titles and headings are inserted in this Agreement for reference purposes only, and shall not be used to interpret the Agreement.

25. **SEVERABILITY:** Each provision of this Agreement must be interpreted in a way that is valid under applicable law. In the event that any provision or portion of this Agreement is determined by a court of competent jurisdiction to be void, invalid, or otherwise unenforceable, such provision or portion shall be deemed reformed, insofar as is possible, to cure the defect and give maximum effect to the intent of the City and Bistro entering into this Agreement, and in any event the remainder of the Agreement shall continue in full force and effect.

26. **ENTIRE UNDERSTANDING:** This Agreement constitutes the entire understanding between or on behalf of the City and Bistro and supersedes any prior understandings and/or written or oral agreements between them or on their behalf respecting the subject matter herein. There are no representations, agreements, arrangements, or understandings, oral or

written, between and among the parties hereto relating to the subject matter of this Agreement, which are not fully expressed herein.

This Agreement may be modified or amended only by a writing signed and dated by both parties. All amendments shall be incorporated and made a part of this Agreement, and attached hereto.

27. **SUCCESSORS AND ASSIGNS:** All rights hereunder shall inure to the benefit of and all obligations hereunder shall be binding upon successors, assigns, subsidiaries, subrogees, parents, agents, employees, attorneys, accounts, legal representatives, directors, shareholders, heirs, and executors or administrators of each of the parties to this Agreement.

28. **COMPLIANCE WITH FEDERAL IMMIGRATION LAW:** At all times during which any term of this Agreement is in effect, Bistro does not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United states Code or the U. S. Attorney General.

29. **AUTHORITY TO EXECUTE:** The terms of this Agreement are contractual and not mere recital, and the individuals executing this Agreement hereby represent and warrant that they have full and complete authority to covenant and agree as herein provided and to execute this Agreement on behalf of the Parties hereto.

30. **AUTHORIZATION TO TRANSACT BUSINESS IN THE COMMONWEALTH:** Bistro hereby represents that it is organized as a stock or nonstock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability

partnership and is authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

31. **COUNTERPARTS**: The Agreement may be signed in counterparts. The Parties hereto agree that facsimile or email signatures shall have the full force and effect of original signatures.

IN WITNESS WHEREOF, the parties hereto have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

(SIGNATURE PAGES TO FOLLOW)

CITY OF NORFOLK

By: _____
City Manager

Attest:

City Clerk

APPROVED AS TO CONTENTS:

Director, Department of General Services

FORM & CORRECTNESS APPROVED:

Deputy City Attorney

BISTRO OF NORFOLK LLC

By: _____

Title: _____

